

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**DANIEL SLEMMER and PAULA
SLEMMER, Individually, and on behalf of
all others similarly situated,**

Plaintiffs,

v.

**MCGLAUGHLIN SPRAY FOAM
INSULATION, INC. and BARNHARDT
MANUFACTURING CO.,**

Defendants.

CIVIL ACTION

NO. 12-6542

O R D E R

AND NOW, this 3rd day of July, 2013, upon consideration of Barnhardt Manufacturing Company's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) (Document No. 9, filed February 15, 2013), and the related filings of the parties,¹ McGlaughlin Spray's Motion to Dismiss Plaintiff's Complaint (Document No. 13, filed February 28, 2013), Plaintiffs' Cross Motion for Discovery and Opposition to Motion to Dismiss (Document No. 16, filed March 14, 2013) and the related filings of the parties,² for the reasons set forth in the Memorandum dated July 3, 2013, **IT IS ORDERED** as follows:

1. Defendants' motions are **GRANTED** as to: Count II of the Class Complaint, that part of Count IV of the Class Complaint which alleges a breach of express warranties, and Count VII of the Class Complaint. These dismissals are **WITHOUT PREJUDICE** to plaintiffs right to file and serve an amended complaint on or before July 17, 2013, consistent with the Memorandum dated July 3, 2013, if warranted by the facts;

1 The related filings are: Memorandum of Law in Opposition to Motion to Dismiss Filed by Defendant Barnhardt Manufacturing Company (Document No. 14, filed March 1, 2013), and Barnhardt Manufacturing Company's Memorandum of Law in Further Support of its motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(B)(6) (Document No. 15, filed March 7, 2013).

2 The related filings are: Reply Brief in Support of Defendant's Statement of Facts in Support of Its Motion to Dismiss (Document No. 17, filed March 25, 2013), and Plaintiffs' Reply Memorandum of Law in Support of Motion for Fed. R. Civ. P. Rule 56(d) Relief (Document No. 18, filed March 28, 2013)

2. The Court **DEFERS** ruling on those parts of defendants' motions which seek dismissal of plaintiff's strict liability claim asserted in Count III of the Class Complaint, until the Supreme Court of Pennsylvania decides Tincher v. Omega Flex, Inc., 64 A.3d 626 (Pa. 2013), or until otherwise warranted by the circumstances of the case;

3. Defendant's motions are **DENIED** on all other grounds; and
4. Plaintiffs' Cross Motion for Discovery is **DENIED AS MOOT**.

IT IS FURTHER ORDERED that the Scheduling Order of April 3, 2013 remains in effect.

BY THE COURT:

/s/ Hon. Jan E. DuBois

DuBOIS, JAN E., J.